

# Determination 2026/001

**The issue of a notice to fix for a pool barrier with a storage box inside the fenced area**

**26 Sheridan Drive, Rolleston, Christchurch**

## **Summary**

This determination concerns an authority's decision to issue a notice to fix for a pool barrier. The determination considers whether the pool barrier complies in relation to a storage box that is permanently located inside and close to the pool barrier. It also considers the form and content of the notice to fix.



**Figure 1: Location of the storage box on the inside of the pool barrier**

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

References to “FOSPA” are to the Fencing of Swimming Pools Act 1987, with its sections referred to as sections of FOSPA. The Schedule to FOSPA is referred to as “the Schedule”, with its clauses referred to as clauses of the Schedule.

The Act and the Building Code are available at [www.legislation.govt.nz](http://www.legislation.govt.nz). Information about the legislation, as well as past determinations, compliance documents (eg, Acceptable Solutions) and guidance issued by the Ministry, is available at [www.building.govt.nz](http://www.building.govt.nz).

## 1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. S McDermott and R Roker, the owners of the property and recipients of the notice to fix (“the owners”), who applied for this determination
  - 1.2.2. Selwyn District Council, acting in its capacity as a building consent authority or territorial authority (“the authority”).
- 1.3. The matter to be determined, under sections 177(1)(b) and (3)(e), is the authority’s exercise of its power of decision in issuing notice to fix NF1310 dated 24 October 2025 in relation to the pool barrier.
- 1.4. In deciding this matter, I must consider whether the pool barrier, with a pool cover storage box (“the storage box”) located inside and close to the barrier, complies with section 162C of the Act. I will also consider the form and content of the notice to fix.

## 2. The building work and background

- 2.1. In 2016, the owners obtained a building consent and installed an in-ground swimming pool with a barrier to restrict access. A code compliance certificate was issued for this work in 2017.
- 2.2. The barrier is an aluminium fence on three sides that is 1200mm in height with vertical bars less than 100mm apart. There is a glass barrier on the remaining side.

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<sup>1</sup> The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

- 2.3. This determination is in relation to one section of the aluminium barrier on the southeast side of the pool.
- 2.4. The storage box (see figure 1) is located inside this part of the pool barrier. It is 220mm from the base of the fence, is 700mm in height, and is bolted in place. The concrete base on which the storage box and the bottom rail of the barrier sit is 180mm above the surrounding ground and extends approximately 100mm out from the base of the barrier.
- 2.5. On 26 May 2025, the authority carried out an inspection under section 162D.<sup>2</sup> The inspection notes state that the pool barrier failed to comply with section 162C because ‘the storage box for the pool cover is too close to the inside of the barrier and could be used as a foothold by a child to gain access over the barrier. Please move the storage box a minimum of 300mm away from the inside of the barrier’.
- 2.6. The authority issued a notice to fix to the owners on 6 June 2025.<sup>3</sup> The owners and the authority exchanged correspondence before the authority issued a new notice, NTF1310, on 24 October 2025. It is this notice that is the subject of this determination.
- 2.7. The ‘particulars of contravention or non-compliance’ section on the notice states:
- Non-compliance was identified at the residential swimming pool on the property. This is in breach of the requirements of section 162C of the Building Act 2004 that requires every residential pool that is filled, or partly filled, with water must have physical barriers that restrict access to the pool by unsupervised children under 5 years of age. The following matters were identified during our inspection.
- (1) The barrier surrounding the pool has permanent objects on the inside of the barrier that could assist children in negotiating the barrier.
- (2) Second notice to fix, superseding outstanding non-compliance under previous notice to fix (NF1200). It is an offence not to comply with notice to fix section under 168(1AA) of the Building Act 2004.
- 2.8. To remedy the contravention or non-compliance, the notice to fix instructed the owners to either:
- Remedy the matters identified so compliance with building code clause F9 - Means of restricting access to residential pools, is achieved;
- Or, Drain the pool of all water, and ensure it remains empty until such time that the [authority] can confirm compliance with the requirements of section 162C have been met.
- This notice must be complied with by: 14/11/2025

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<sup>2</sup> Section 162D requires territorial authorities to ensure residential pools in their jurisdiction are inspected at least once every three years.

<sup>3</sup> I have not been provided with a copy of this notice.

### 3. Discussion

#### Legislation

- 3.1. The provisions for notices to fix are in sections 163 to 168. Section 164(1)(a) provides for an authority to issue a notice to fix if it considers, on reasonable grounds, that a specified person is contravening or failing to comply with the provisions of the Act or the regulations.
- 3.2. Section 165 provides for the form and content of a notice to fix, which must be in a prescribed form.<sup>4</sup> The prescribed form includes a space to specify the “particulars or contravention or non-compliance”. The courts and previous determinations have discussed this, including that the recipient of the notice must be “fully and fairly informed” by the particulars, so they can address the identified issues.<sup>5</sup>
- 3.3. A notice to fix may be enforced by prosecution for failing to comply with the notice. A person commits an offence if they fail to comply with a notice to fix and is liable on conviction to a fine. Given the serious consequences, it is important that notices to fix provide adequate information for owners to remedy the issues.
- 3.4. In this case, the authority has alleged in the notice that the owners are contravening section 162C.

#### Whether there is a contravention or non-compliance with section 162C

- 3.5. Section 162C(1) requires “Every residential pool that is filled or partly filled with water must have physical barriers that restrict access to the pool by unsupervised children under 5 years of age.” Subsection (2) sets out various ways for pool barriers to comply. It states:
  - (2) The means of restricting access referred to in subsection (1) must comply with the requirements of the building code—
    - (a) that are in force; or
    - (b) that were in force when the pool was constructed, erected, or installed (after 1 September 1987) and in respect of which a building consent, code compliance certificate, or certificate of acceptance was issued (in relation to the means of restricting access to the pool).

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<sup>4</sup> Form 13 of the Building (Forms) Regulations 2004.

<sup>5</sup> See *Andrew Housing Ltd v Southland District Council* [1996] 1 NZLR 589, which related to a ‘notice to rectify’, the equivalent of a notice to fix in the Building Act 1991; *Marlborough District Council v Bilsborough* [2020] NZDC 9962 at [106]–[107]; Determination 2024/029 *An authority’s decisions to issue a series of notices to fix* (27 May 2024) at [4.2]–[4.3], and Determination 2025/030 *An authority’s decisions to issue notices to fix for building work carried out without a building consent* (1 July 2025) at [3.1] – [3.6].

- 3.6. The authority's concern is the potential for a child to utilise the storage box to enable them in navigating over the barrier from the outside. The owners are of the view that "it would be impossible for a young child to scale the fencing using the storage box as leverage" because of the height of the box. They consider the location of the storage box and the pool barrier "is safe" when considering the "housing fencing restrictions on access to the property and lack of leverage to scale [the barrier]".
- 3.7. Based on the information provided by the authority, the building consent was granted in 2016 when FOSPA was in force<sup>6</sup>, and the pool constructed in that year. Notes within the plans and specifications also reference FOSPA.
- 3.8. Therefore, under Section 162C(2)(b), the barrier must either comply with Building Code clause F4 *Safety from Falling* that was current at that time or with Building Code clause F9 currently in force. I will consider first whether the barrier complies with clause F4.
- 3.9. The relevant performance criteria in clause F4 relating to swimming pools are:
- F4.3.3** Swimming pools having a depth of water exceeding 400mm, shall have barriers provided.
- F4.3.4** Barriers shall:
- ...
- (f) In the case of a swimming pool, restrict the access of children under 6 years of age to the pool or the immediate pool area.
- F4.3.5** Barriers to a swimming pool shall have in addition to performance F4.3.4:
- ...
- (b) No permanent objects on the outside of the barrier that could provide a climbing step.
- 3.10. Section 17 provides that all building work must comply with the Building Code. Section 19 provides various means of establishing compliance with the Building Code that must be accepted by authorities, and this includes Acceptable Solutions.
- 3.11. At the time the owners' pool was constructed, the relevant Acceptable Solution for clause F4 was F4/AS1, in which the Schedule to the FOSPA was cited.<sup>7</sup> Accordingly, if the barrier complies with F4/AS1, by way of the Schedule, the authority must accept this as establishing compliance with the Building Code.
- 3.12. The clauses of the Schedule detail the requirements for the construction of barriers to restrict access to residential pools by children under the age of 6 years<sup>8</sup>, such as the heights of barriers, clearances of the barrier from the ground and from any

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<sup>6</sup> FOSPA was repealed on 1 January 2017.

<sup>7</sup> Acceptable Solution F4/AS1 (third edition, amendment 1, effective 21 June 2007 to 30 May 2017) at 1.2.7.

<sup>8</sup> I note that restricting access to children under six years of age was the requirement of clause F4 at the time the owners pool was constructed, whereas under clause F9 and section 162C(1) it is now under five years of age.

objects or projections on the outside of the barrier, operation of gates and maximum sizes of gaps in the barrier.

- 3.13. However, F4/AS1 and the Schedule it cites do not include a requirement to consider objects located inside the barrier, ie within the immediate pool area, even when they are adjacent to the pool barrier. These compliance documents only consider objects or projections on the *outside* of the physical barrier that could assist a child to negotiate the barrier<sup>9</sup>, reflecting the requirement in performance criteria F4.3.5(b).
- 3.14. As compliance with Acceptable Solutions must be accepted under section 19 as establishing compliance with the Building Code, I consider the barrier with the storage box located on the inside of it complies with the Building Code that was in force at the time of the owners pool being constructed, by way of the F4/AS1 and the Schedule of the FOSPA. The authority in its inspection did not raise any concerns about other aspects of the compliance of the barrier, and therefore I conclude the barrier complies with the requirements of section 162C.
- 3.15. The owners noted that during previous compliance checks, which I take to mean 3-yearly inspections by the authority under section 162D, the barrier was found by the authority to be compliant, including in relation to the location of the storage box. However, previous determinations have noted that the provisions in the Act for residential swimming pools mean the authority can issue a notice to fix at any time during the lifetime of the pool if it considers the barrier does not meet the requirements in section 162C, no matter if the barrier was previously considered to be compliant and has a code compliance certificate issued in relation to it.<sup>10</sup>

### **The notice to fix**

- 3.16. While I have found there has been no contravention for the authority to issue the notice to fix in relation to, the details given in a notice to fix are fundamental to the recipient being fairly and fully informed about the basis for the notice.
- 3.17. In this case, the notice to fix states “The barrier surrounding the pool has permanent objects on the inside of the barrier that could assist children in negotiating the barrier” but does not identify what these “permanent objects” are.
- 3.18. The authority has also included as a contravention in the notice to fix that the owners did not comply with a previous notice to fix. Where a specified person fails to comply with a notice to fix, section 168 sets out that this is an offence. If an authority wishes to act specifically in relation to someone failing to comply with a

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<sup>9</sup> I note that the current Acceptable Solution F9/AS1 *Means of restricting access to residential pools*, which replaced F4/AS1 and the Schedule of the FOSPA in relation to swimming pools, also does not consider objects or projections within the immediate pool area (i.e., inside the barrier) and adjacent to a barrier that could assist a child in negotiating the barrier.

<sup>10</sup> See for example Determination 2022/024 *The issue of two notices to fix for a pool barrier subject to a code of compliance certificate* (9 November 2022), at 5.2 – 5.5.

notice, section 168 is available to the authority to prosecute the person for that offence. While section 164 states a notice to fix can be issued if a specified person is contravening or failing to comply with the Act, the failure to comply with a notice to fix itself is not a contravention for the purposes of section 164, so should not have been included in this notice.

- 3.19. In respect of the remedies for compliance with the notice, the authority required compliance with Building Code clause F9 *Means of restricting access to residential pools*. However, as discussed above, the pool and barrier were constructed in 2016, and therefore the compliance with the Building Code that was in force at that time is also available as a remedy; the authority cannot require the barrier to comply only with the current Building Code.
- 3.20. I consider the notice to fix did not adequately describe the alleged contravention to fully and fairly inform the specified person of the alleged contravention. It also included a particular which is not a contravention, and did not provide an appropriate remedy given the time in which the pool and barrier were constructed.

### **Additional comment**

- 3.21. The authority has referred to NZS 8500:2006 3.3.6<sup>11</sup> in correspondence with the owners, which states:

#### **Horizontal surfaces inside the barrier/fencing**

Where any nearby horizontal surfaces that could be used as holds for climbing are permanently located near the inside of the fencing and where the spacing between vertical members is greater than 10 mm, such surfaces shall be separated from the fencing by a distance of not less than 300 mm.

- 3.22. NZS 8500:2006 is not a cited standard, in relation to this paragraph, in either F4/AS1 that applied at the time of the pool being constructed or in the current F9/AS1.
- 3.23. However, I acknowledge the authority's concerns about whether the storage box "could be used as holds for climbing" and assisting a child five years or under in negotiating the barrier.
- 3.24. Previous determinations and studies have discussed how children negotiate barriers, including those with vertical members, and from those I note the following:
- 3.24.1. Barriers can be used to prevent or delay children's access to swimming pools but "it is hard to construct a barrier that will protect all children", and "the

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<sup>11</sup> New Zealand Standard 8500:2006 *Safety barriers and fences around swimming pools, spas and hot tubs*, section 3.3.6.

time of delay is an important property of a safe barrier as it gives the caregiver time to react”.<sup>12, 13</sup>

- 3.24.2. Even the designs given in the F4/AS1 will not be incapable of being climbed by all children under the age of six years. Most of them will not be capable of being climbed by children under three years, but older children will climb them if they really want to. For these children, the barrier acts as a deterrent.<sup>14</sup>
- 3.25. On the owners’ property, the storage box is 700mm in height and 220mm from the barrier. The side of the box has been built from horizontal timbers screw-fixed close together, so the first gap that could be used as a toe hold is at approximately 680mm from the concrete pad it sits on, where the side and top adjoin.
- 3.26. A child using the storage box to assist in negotiating the barrier would either use the toehold at 680mm height or the top of the box at 700mm while holding onto the barrier. Alternatively, a child could ‘walk’ their feet up the side of the storage box while holding the barrier.
- 3.27. Older children would be able to reach the top of the barrier to use as a handhold.<sup>15</sup> However, for most children, using the toehold at 690mm or the top of the box as a foothold would place their foot above hip height and this lessens their ability to push/lever themselves up. It may be possible to ‘walk’ up the face of the storage box presents instead, but the foothold being in the inside of the barrier requires shifting their centre of gravity back to bring their feet back through the barrier while relying on upper body strength.
- 3.28. In my opinion, although the box could assist an older or determined child, due to the height and distance of the storage box inside the barrier its presence does not compromise the barrier’s primary function of restricting access by unsupervised children under five years of age.

## Conclusion

- 3.29. There is no contravention of section 162C as the barrier complies with F4/AS1 by way of the FOSPA Schedule, as the established means of compliance at the time the pool and barrier were constructed.

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<sup>12</sup> Determination 2024/044 *Whether a swimming pool barrier complies with Clause F9 of the Building Code* (20 August 2024), at 4.5 – 4.6.

<sup>13</sup> *Child safety barriers*, study commissioned by ANEC (European Association for Consumer Representation in Standardisation), Engdahl, Spånglund, Waller (2009)

<sup>14</sup> Determination 2011/019 *Compliance of a proposed safety barrier to a house deck* (9 March 2011), at 4.3.9.

<sup>15</sup> Based on the median height of a five-year-old child (1100mm) and the median height of a two-year-old (865mm) from Growth Charts provided by HealthNZ, last updated 14 April 2025, using the 50<sup>th</sup> percentile



- 3.30. The notice to fix is deficient in its particulars and remedies as it did not appropriately describe the building work of the alleged contravention, included a particular which is not suitable in a notice to fix, and the remedy did not take into account section 162C(2)(b).

## **4. Decision**

- 4.1. In accordance with section 188 of the Building Act 2004, I reverse the authority's decision to issue notice to fix NF1310.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 7 January 2026.

**Peta Hird**

**Lead Determinations Specialist**